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No. 88-581 (3)

In the Supreme Court of the United States

OCTOBER TERM, 1988

UNITED STATES OF AMERICA, PETITIONER

v.

REGINALD DEAN STILL

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY MEMORANDUM FOR THE UNITED STATES

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In this case, the Ninth Circuit held that a person must be "actual[ly] mov[ing]" toward a bank or undertake steps that are "analytically similar to such movement," Pet. App. 7a, before he has committed attempted bank robbery, regardless of his proximity to the bank or other proof clearly demonstrating that a bank robbery is about to transpire. Respondent makes no attempt to defend that rule of law. Instead, he offers several reasons why the decision below does not warrant review by this Court. None, however, has merit.

1. Respondent contends (Br. in Opp. 5-8) that the Ninth Circuit's decision in this case does not conflict with the decisions from the Second, Fourth, Seventh, and Eighth Circuits cited in our petition (at 8-10) because the Ninth Circuit also applied the ALI Model Penal Code definition of an attempt to the Bank Robbery Act, 18 U.S.C. 2113(a) (1982 & Supp. IV 1986). That claim misses

the point. As we explained in our petition (at 12-13), although the Ninth Circuit purported to apply the Model Penal Code definition to the Bank Robbery Act, that court adopted the additional requirement, unknown to the Model Penal Code or to any other federal circuit decision, that a bank robber must be actually moving toward the bank or engage in analytically similar conduct before he can be found guilty of attempted bank robbery. Neither the Second, Fourth, Seventh, nor Eighth Circuit has adopted that requirement. On the contrary, those courts have upheld convictions for attempted bank robbery under circumstances in which the accused was engaged in no such conduct when his plans were foiled. The decision below therefore cannot be reconciled with the decisions from the other circuits that are cited in our petition.

2. Petitioner attempts to explain away the conflict among the circuits by arguing (Br. in Opp. 7-8) that the government did not prove that he had taken any steps to rob the Security Pacific Bank, rather than some other bank or a retail store, when he was stopped by Officer Hensley. That claim is meritless. The Ninth Circuit found that petitioner had "an unequivocal intent to rob the Security Pacific Bank," Pet. App. 6a, and that finding is plainly correct. Petitioner admitted that he was about to rob a bank; petitioner was spotted in a parking lot only 200 feet from the Security Pacific Bank; petitioner's description of his target matched the Security Pacific Bank; none of the other 38 banks within a five-mile radius of the shopping center where petitioner was spotted fits that description; petitioner said that the Security Pacific Bank sounded like the name of his target; that bank has a drive-up teller's window; affixed to petitioner's fake bomb was tape that could be used to attach the bomb to the window; and one of petitioner's demand notes expressly told

the teller "DO NOT BE RESPONSIBLE FOR DESTROYING YOUR *BANK* AND KILLING THE PEOPLE," GX 3 (emphasis added). See Pet. 4-5; Pet. App. 3a-4a. In light of that evidence, petitioner is quite wrong in asserting (Br. in Opp. 8 (emphasis omitted)) that the government proved no "conduct directed toward the robbery of that particular bank." His conduct is explicable only on the ground that it was "specifically directed towards that bank" (Br. in Opp. 7), and not some other facility.

3. Petitioner also contends (Br. in Opp. 7) that the decision below is, at most, an isolated misapplication of the Model Penal Code's definition of an attempt. That argument is unpersuasive.

As we explained in our petition (at 6-7 & n.4, 15), the Ninth Circuit first adopted the rule in question in *United States* v. *Buffington*, 815 F.2d 1292 (1987). Even if the decision in *Buffington* could be considered an isolated aberration, the Ninth Circuit has now applied that rule again in this case and appears ready to apply it as well in any future case involving roughly similar facts. Moreover, as the decisions from the Ninth Circuit and other courts of appeals demonstrate, cases such as this one arise with some frequency. Either because of informants' tips, good police work, or citizens' observations, law enforcement officers often find themselves in a position to halt a bank robbery before the robbers have actually entered the bank. If the officers must wait until the robbers have entered the bank or begun moving toward it before making arrests, the danger of injury to officers, innocent citizens, and the robbers themselves is obviously increased. The Ninth Circuit's rule thus imposes a pointless requirement that will interfere with the interception and prosecution of bank robbery attempts in a significant number of cases.

4. Petitioner argues (Br. in Opp. 9) that, although "his conduct was no doubt suspicious enough to merit police inquiry, if not arrest," it was insufficient to support his conviction. The Ninth Circuit, he argues, "does not require physical proximity"; it demands only "some unequivocal conduct directed toward the criminal objective," and he undertook no such conduct. *Ibid.*

Respondent, however, has misstated the Ninth Circuit's test. That court set aside respondent's conviction because it found that "[o]ur facts do not establish either actual movement toward the bank or actions that are analytically similar to such movement." Pet. App. 7a. If the Ninth Circuit's standard could be satisfied simply by "some unequivocal conduct directed toward the criminal objective," the evidence here would have been more than sufficient. Respondent constructed a realistic-looking fake bomb, he prepared that bomb for use, and he drafted two demand notes threatening to blow up the bank and kill everyone in the vicinity if his demands were not met. Those are precisely the types of steps that precede a bank robbery and therefore fit the Second Circuit's description of acts that are "uniquely criminal and generally incompatible with innocent purpose." *United States* v. *Manley*, 632 F.2d 978, 989 (1980), cert. denied, 449 U.S. 1112 (1981). See *United States* v. *Jackson*, 560 F.2d 112, 120 (2d Cir.), certs. denied, 434 U.S. 941 (1977) and 434 U.S. 1017 (1978).

5. Finally, petitioner argues (Br. in Opp. 10-11) that the judgment below should be upheld on a different ground, one that the Ninth Circuit did not consider. In petitioner's view, the Bank Robbery Act requires that a person actually use force or intimidation against a bank employee before that person can be convicted of attempted bank robbery. Because he confronted no one before he was seen by the police, petitioner argues, he cannot be found guilty of that crime.

That position is even more restrictive than the Ninth Circuit's rule. Under petitioner's interpretation of the Act, he would not have committed attempted bank robbery until *after* he had driven over to the bank and *after* he had placed the fake bomb and first demand note on the teller's window. The only authority cited by petitioner to support that strange result is dictum in a 1955 district court decision, *United States* v. *Baker*, 129 F. Supp. 684, 686 (S.D. Cal.),* and that dictum is irreconcilable with the circuit court decisions cited in our petition. In fact, in *United States* v. *Jackson*, 560 F.2d at 116, quoting *United States* v. *Stallworth*, 543 F.2d 1038, 1040 (2d Cir. 1976), the Second Circuit expressly rejected the dictum in *Baker*, stressing that " '[a]ttempt is a subtle concept that requires a rational and logically sound definition, one that enables society to punish malefactors who have unequivocally set out upon a criminal course without requiring law enforcement officers to delay until innocent bystanders are imperiled.' "

Petitioner's interpretation of the attempt provision also misreads the plain text of the Bank Robbery Act. The phrase "by force and violence, or by intimidation" modifies both the verb "takes" and the verb "attempts." In the case of an attempt, that phrase requires only that a person would have used such means if his crime had succeeded. The Act does not require the actual use of force or intimidation to complete an attempt. In this case, petitioner's homemade fake bomb shows that he would have taken the bank's money "by intimidation" if he had been

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* In *Baker*, the district court upheld the defendant's attempted bank robbery conviction because he used a means of intimidation, 129 F. Supp. at 687, so the court had no occasion to decide whether the actual use of force or intimidation is an essential element of that crime.

successful, which is all that the Bank Robbery Act requires.

For the foregoing reasons and those given in our petition, it is respectfully submitted that the petition for a writ of certiorari should be granted.

WILLIAM C. BRYSON
Acting Solicitor General

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